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CHARLES ELMORE CROP

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 79

THE GOODALL COMPANY,

Petitioner,

vs.

RUBY E. SARTIN.

No. [redacted] 80

THE GOODALL COMPANY,

Petitioner,

vs.

WILLIAM SARTIN.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 987

THE GOODALL COMPANY,

Petitioner,

vs.

RUBY E. SARTIN.

No. 988

THE GOODALL COMPANY,

Petitioner,

vs.

WILLIAM SARTIN.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, The Goodall Company, will be referred to as "Petitioner;" Ruby E. Sartin will be referred to as "Respondent;" William Sartin will be referred to as "William Sartin;" and the two collectively as "Respondents."

Unless otherwise stated, figures in parentheses will refer to the pages of the record. Emphasis is ours.

Petitioner respectfully shows to the court:

Summary Statement of Matter Involved.

(1) Respondent, Ruby E. Sartin, and her husband, William Sartin, citizens and residents of Knox County, Tennessee, sued Petitioner (operating a clothing factory in Knoxville, Tennessee), separately for $25,000.00 and $5,000.00 damages, in the State Circuit Court of Knox County, Tennessee (11-12). Respondent (employed by Petitioner as seamstress from October, 1933, to February 27, 1940) (2-3), charged Petitioner with violation of a Tennessee Ventilation Statute, alleging that she contracted "permanent illness and disability of her lungs" (3) from breathing starch dust precipitated into the air by sewing machine needles penetrating boys' pants pocket material Respondent was sewing in Petitioner's factory. William Sartin sued for loss of his wife's services and expenses. They charged that Petitioner violated a Tennessee Ventilation Statute and failed to install suction fans, which they alleged would have carried the dust out of the room where Respondent was working (1-6). Petitioner, a Maine corporation (24), removed the cases to the United States District Court at Knoxville, Tennessee, upon the ground of diversity of citizenship (28-33).

(2) From a jury verdict and judgment for Ruby E. Sartin of $2,000.00, and William Sartin of $500.00, Petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit (66-7-8), alleging error committed by the District Judge in overruling Petitioner's motions for directed verdicts (56-7), judgments non obstante veredicto (59-61) and new trials (60-62).

(3) By agreement, the cases were consolidated and only one record was sent to the Circuit Court of Appeals for the Sixth Circuit (67), where the Court, speaking through his Honor, Circuit Judge John D. Martin, affirmed the judgment of the District Court on February 15, 1944 (437), and on April 7, 1944, a rehearing was denied (475).

(4) The right to recover rests solely on the claim of disability resulting from tuberculosis ("permanent illness and disability of her lungs") (3) alleged to have been caused from breathing starch dust (3). When it was developed on the trial that tuberculosis was a germ disease (137), the declaration was amended so as to base the cause of action upon the allegation that:

> "* * * if she had a pre-existing disorder or disease of her lungs, nasal passages or throat, was caused to be extended or increased * * *" (48)

by breathing the dust.

(5) The diseased condition of Respondent's lungs complained of was at its worst on or prior to February 9, 1940 (145-380), one year and six days before these suits were brought on February 15, 1941 (11-12), no "continuing tort" caused any injury after February 9, 1940. Petitioner answering, denied all averments of violation of the Ventilation Statute and injury and cause of injury, and averred that the actions were barred by Tennessee's one-year Statute of Limitations (34-41).

(6) The recoveries ($2,000.00 and $500.00) in no degree measure the magnitude of these cases to Petitioner. If sustained, they will establish the far-reaching precedent for similar recoveries by any of Petitioner's other employees (more than 350) (214) contracting any germ disease—tu-

berculosis, pneumonia, influenza, typhoid fever, measles, mumps, etc.—by the simple process of:

(a) the employee swearing that she was required to breathe harmless starch dust while working; and,

(b) having a doctor swear that breathing harmless starch dust, causing a dry nose and throat, possibly might or could have rendered the employee an easier victim of the germ disease, or possibly might or could have caused to be "extended or increased * * * a pre-existing disorder" (48).

(7) Petitioner files this petition for writ of certiorari upon the ground that the District Court, in overruling its motions for directed verdicts, judgments non obstante veredicto and new trials, and the Circuit Court of Appeals, in affirming the action of the District Court, erred and have decided important questions of local law in a way that conflicts with applicable local decisions, and has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter. The decisions of the Tennessee Supreme Court, being Tennessee's court of last resort, in conflict are the unreported opinion of the Court in *Brooks Sand & Gravel Company* v. *Alfred Bond*, certified by the Clerk of that Court, and appearing verbatim in the record (469), and the opinion in *Mayor* v. *Reese*, 138 Tenn. 471.

(8) *Brooks* v. *Bond* involved tuberculosis alleged to have resulted from injury to Bond's lungs from breathing cement dust. Brooks was charged with violation of exactly the same statute Petitioner is charged with violating in the case at bar, the only difference being that Bond breathed cement dust, and Respondent breathed starch dust. A recovery was denied.

(9) In *Mayor* v. *Reese*, 138 Tenn. 471, the injured was thrown from a wagon and injured his back, bladder and

dneys, and later developed pneumonia from which he ied. His representative sought to recover damages for is death upon the ground that the injury caused the pneuonia, and produced testimony that the deceased, as a result f the injury, was much more likely to a pneumonia attack an had he been a well man and could have resisted—the njury was a predisposing cause, and rendered plaintiff a rey to any of the ordinary germs of disease (481). The ourt dismissed the suit.

(10) The Circuit Court of Appeals' decision in this case s likewise directly in conflict with the decision in *May* v. *Bell* (C. C. A. 8, 1932), 61 Fed. (2d) 830, a case involving laim for disability resulting from tuberculosis, in which t was claimed that an injury sustained by claimant lowered he resistance of the injured and "the child was more susceptible to tuberculosis." A recovery was denied.

This Court Has Jurisdiction to Review the Judgment of the Circuit Court of Appeals.

(11) These cases were properly removed from the State Court to the United States District Court at Knoxville, Tennessee, because they each involved a controversy exceeding $3,000.00 in value, exclusive of interest and costs, between the Respondents, citizens of Tennessee, and Petitioner, a Maine corporation, Judicial Code, Section 24 amended, USCA, Title 28, Section 41, Subsection (1). This Court has jurisdiction to review on petition for certiorari, the action of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court. Judicial Code, Section 240 amended, USCA, Title 28, Section 347, Subsection (a). The Circuit Court of Appeals in the case at bar has decided an important question of local law in a way that conflicts with applicable Ten-

nessee decisions, and the decision conflicts with the decision of another Circuit Court of Appeals on the same matter.

Statement of Facts.

(12) For the purposes of appeal to the Circuit Court of Appeals, and this petition for writ of certiorari, Petitioner's position is that there is no evidence to support the verdicts and we admit as true, everything that Respondent's witnesses testified to and admit that the Court must give Respondent's theory the most favorable consideration in construing the testimony, and must disregard any question of admissibility.

(13) To cast Petitioner under the Tennessee Statute, it must be proved that Respondent sustained an *injury* (there can be no recovery for mere *inconvenience*) (470) to her lungs, nose or throat from breathing dust. By its terms the Statute is violated if the dust is:

"injurious to the health," (3)
"detrimental to the health," (4)

and the only requirement of the Statute is that Petitioner

"render (dust) harmless as far as practicable," (3)

and the Statute further provides:

> "That if *natural ventilation* sufficient to exclude the harmful elements above enumerated be provided, the requirements of this section shall have been complied with * * *" (4)

The sections of this Tennessee Statute pertinent here are set out verbatim in the record (3 and 8) and in the Circuit Court of Appeals' opinion (439).

(14) Respondent's doctors said Respondent had pulmonary tuberculosis when she quit work at Petitioner's plant, and had it at the date of the trial (134-153).

(15) The undisputed testimony of Respondent is that:

"*Prior* to the time I *commenced* on the boys' pockets with that starch in it my *health was perfect.* As far as I know, I never had a serious illness in my life.

"Q. Now, after you started to work on these starched pockets that you speak of, what effect, if any, did it have on your good health that you spoke of a while ago?

"A. Well, it began with that, it caused *irritation in my throat and nose*, but *I didn't notice any physical pain* except from this irritation, and with the *headaches* I had was caused from the lack of air. I don't think the starch caused my headaches. *I did have quite a few headaches* * * * (87-88).

"If I stayed there three or four hours at a time my nose would bleed * * *" (83).

"* * * then up in the mornings when we first went to work you had a *smothering* feeling * * * (85).

"* * * *it took me about an hour* to get home from the plant—*by the time I got home it would be greatly relieved*, blowing it out of my nose and possibly *by morning I would not feel any effect at all*, or if I had been working on it more than two or three hours a day then *before morning the* soreness and dryness would be gone (88) * * *.

"Q. You had been feeling quite badly up to that time?

"A. *No, I had not.* It was a sudden attack of appendicitis (in 1937) and they sent me to the hospital (104).

"* * * I would say almost two weeks in the hospital (104) * * * something like seven or eight weeks before I went back to work at Goodall (104).

"Q. Did you feel like you had *gained your normal weight and strength* by the time you went back?

"A. Yes.

"Q. *Had no trouble working* after that so far as being weak?

"A. No.

"Q. Or *run down* is concerned?

"A. No.

"Q. *And that continued right along up until the time you left there (February 27, 1940), didn't it?*

"A. Yes.

"Q. *Your good health?*

"A. Yes" (105).

(16) When Respondent was examined and X-rayed on February 9, 1940, she felt fine and didn't dream there was anything wrong.

"Q. I believe you stated to me before that you never dreamed that there was anything wrong with you?

"A. *No, I didn't dream that there was anything wrong* * * * (105).

"Q. Then you went back to your work (after her February 9, 1940 (105) examination, and worked there up until February 27, 1940; is that right?

"A. That's right.

"Q. That was the *last time that you worked?*

"A. Yes, February 27th, (1940).

"Q. And at that time you had *been able to go to work feeling all right?*

"A. *Yes*" (105-6).

(17) All Respondent's doctors say about Respondent breathing starch dust and its producing any injury or causing or aggravating or increasing tuberculosis in Respondent's lungs is:

"It is *possible* that any foreign substance like that *would aggravate* and *make worse a condition* * * *" (Armstrong, 155).

"* * * *could or might* have (Hodge, 424) aggravated the condition as to cause it to develop more rapidly * * * (Hodge, 423) * * * *might predispose* * * * lower the vitality * * * and make the patient more prone to develop the disease" (Hodge, 137).

"* * * predisposing cause which would *create a more probable situation*" (Hodge, 422).

(18) Petitioner's doctors, Abercrombie (381-2), Nave (365) and Acuff (397) are undisputed in their testimony that there was no dust injury to Respondent's lungs, Nave saying:

> "Q. * * * I will ask you to state whether or not these *X-rays reflected any condition* that indicated Mrs. Sartin had been *injured* in her lungs by *breathing dust of any kind?*
>
> "A. *It definitely failed to.*
>
> "Q. *If there had been any such injury, would the X-rays have reflected it?*
>
> "A. *Yes*" (365).

(19) Dr. Nave further said:

> "Q. Now, Doctor, *in your conversations with Mrs. Sartin* and the history as given and those reports as you obtained it from her, and knew it, *did she give you any history or make any claim* of having been *injured* in any way by *breathing dust?*
>
> "A. *No.*
>
> "Q. Was that ever mentioned to you at any time?
>
> "A. No. (363-364).
>
> "Q. You made an examination of the throat on all of those occasions?
>
> "A. Yes.
>
> "Q. *Was there ever any claim on her part that there was anything the matter with her nose and throat at any* time?
>
> "A. *No*" (364) * * *.

No witness denies the above.

(20) There is no testimony in the record from Respondent's witnesses about ventilation. They simply described the conditions and said nothing about the ventilation—natural or otherwise—and whether it was sufficient or insufficient. Respondent said:

> "It settled on your clothing in your hair or dress and in the folds of our flesh * * * (83). It was in

> the air continuously when we were sewing on the boys' pants * * * I know it is just starch * * *" (86).

(21) The only witnesses testifying whether the ventilation was sufficient are Petitioner's witnesses, Robertson, Professor of Chemistry at the University of Tennessee (279); Huddle, Professor of Chemistry at the Tennessee State Normal College (328), (Defendant's Exhibits 22-24, introduced at 289), and Morton, Professor of Mechanical Engineering at the University of Tennessee (240), who has had large experience in heating and air conditioning in manufacturing plants (241-42-43).

(22) The two chemists took samples of the air under exactly similar conditions to those complained of by Respondent and made dust counts and testified that the dust content of the air was harmless and was present in harmless quantity, and was *not injurious or detrimental to health*, and met all the requirements of the statute as to quantity and ingredients for health and safety (279-328).

(23) The testimony of Petitioner's witnesses, Robertson (279), and Huddle (328), was not disputed by Respondent or her witnesses (no other witness testified on the question), and the results of their findings are summarized in Petitioner's Exhibits 22 and 24 (introduced 289), and in order that the Court may have easy access to this summary of this necessarily complicated testimony of these two witnesses, we are filing a copy of Defendant's Exhibits 22 and 24 as an addenda hereto. These Exhibits, by order of the District Court (77), were sent to the Circuit Court of Appeals in original form, and by order of the Circuit Court of Appeals, certified and appearing with the Exhibits, were sent in original form to this Court.

(24) The mechanical engineer testified that the ventilation was sufficient, the temperature was well within the

safety range, and the air in the plant met all of the requirements of the statute for health and safety (252). Nobody disputes this, and Respondent offered no witness upon the question.

(25) The burden of proof was on Respondent, and in order to sustain these actions, and to entitle the Respondent to go to the jury, there must have been some evidence that there had been a violation of the statute and some disabling injury to the Respondent, resulting from the violation of the statute. There was no such evidence.

(26) Even if there had been dust in harmful quantities and bad air violating the statute, the suits should have been dismissed because all they caused was *inconvenience*, which cannot be recovered for (470). The tuberculosis came from a germ for which Petitioner was not responsible.

(27) The diseased condition of Respondent's lungs complained of was at its worst on or prior to February 9, 1940 (384-85), one year and six days before these suits were brought on February 15, 1941 (11-12), and Dr. Abercrombie so testifies for Petitioner, and nobody denies what he says:

> "Q. Now, Doctor, on this February 9, 1940, history which I understand was based on what you saw, there is a statement that there was a left negative and right early active minimal T. B. right apex. What do you mean by minimal there?
>
> "A. I mean that there is not very much infection there or does not cover a large area. Small.
>
> "Q. You say early active minimal. What do you mean by early?
>
> "A. I mean it has not been there very long evidently so far as we could tell by the X-ray.
>
> "Q. But it was definitely there?
>
> "A. Oh, yes, from the X-ray standpoint it is definitely there.

"Q. *And as much so as it has been since* according to your subsequent X-ray examinations?
"A. Yes" (384-85).

No witness for Respondent testifies upon this question. The suits were barred by Tennessee's one-year Statute of Limitations.

Questions Presented and Reasons Relied on for Allowance of the Writ.

(28) The Circuit Court of Appeals should have reversed the action of the District Court denying Petitioner's motions for directed verdicts, judgments non obstante veredicto, and new trials (56-57-60-62), and dismissed the cases because there was no evidence to support the verdicts. In refusing to reverse, the Court has decided important questions of local law in a way that conflicts with applicable local decisions, and has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

(29) The Circuit Court of Appeals' opinion in the case at bar is not reported in either the Federal Reporter or Advance Sheets, but appears verbatim in the record at (438) et seq., and our references to the opinion will be to the pages of the record where it appears.

(30) The Circuit Court of Appeals, in its opinion, said:

"While on quick reading *Brooks Sand and Gravel Company, Inc.* v. *Bond*, supra, might seem to support appellant's contention that its motion for a directed verdict should have been granted, that authority is, upon careful analysis, *distinguishable* upon its facts, as appears from the *preceding narrative of the evidence in the case at bar*" (451).

Brooks v. *Bond* involved an alleged injury to Bond's lungs from breathing *cement dust*, and Brooks was charged

with violation of exactly the same Tennessee Statute Petitioner is charged with violating in the case at bar (469).

(31) The record contains no facts upon which *Brooks* v. *Bond* (469) may be distinguished, and the opinion contains no "preceding narrative of the evidence" from which the case may be distinguished. The facts of the case at bar are exactly similar to those found in the Tennessee Court's opinion in *Brooks* v. *Bond* (469) and the Tennessee cases hereinafter cited, and we submit that, under the authority of *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. Ed., 1188, the Circuit Court of Appeals, in deciding the case at bar, was required to follow and apply the law laid down by the Tennessee Court, and it failed and refused to do so.

(32) The "preceding narrative of the evidence in the case at bar" (451) occurs in the Court's opinion beginning at page 442, and ending at page 451. We assert that this learned Court can take the facts set forth in the "narrative" and apply the law laid down in the Tennessee cases and the cases at bar must be dismissed. The "narrative" begins with the testimony of Respondent and, except in the particulars hereinafter stated, the "narrative" contains nothing more than a substantial repetition of what we have said in our "Statement of Facts" hereinabove.

(33) The Circuit Court of Appeals said:

> "Even though the proof fell short of showing that appellant's negligence proximately caused Mrs. Sartin's tuberculosis, the jury could properly award her damages for such personal injury and physical pain, with concomitant mental suffering, as was in their judgment on the evidence adduced, proximately caused by appellant's negligence in failing to observe the statutory requirements." (441-42).

This statement is without any supporting evidence or foundation. Aside from the tuberculosis, the only result

of Respondent's breathing starch dust was *inconveniences* —irritation of nose and throat, nose bleed, quite a few headaches, smothering feeling (83-85-87-88) but "by morning I would not feel any effect at all * * * the soreness and dryness would be gone" (88).

(34) The Tennessee Supreme Court in *Brooks* v. *Bond* (469) reversed and dismissed a $2,000.00 recovery in favor of Bond for "inconveniences," the Court saying:

> "Plaintiff testified that this cement dust was so thick in the working place as to render breathing difficult, that he would cough up cement after he quit work, would have to grease his nose in order to stay in the place, and details other *inconveniences*. He said that he had always been a strong man and did not feel any serious effects from this exposure until three or four months before he quit work" (470).

(35) The two cases (*Brooks* v. *Bond* (469) and the case at bar) are squarely on all fours and the tactics observed were exactly the same, in that they both started out with tuberculosis ("permanent illness and disability to her lungs") (3), and wound up with the discovery that tuberculosis was a germ disease, and they then retreated to the afterthought embodied in the amendment, being *extension and increase of existing disorder* (48), and the *inconveniences*, nose and throat irritation, nose bleed, headaches and smothering feeling (83-85-87-88), which the Circuit Court of Appeals describes as "such personal injury and physical pain, with concomitant mental suffering" (441).

(36) The Circuit Court of Appeals further said:

> "Her health was perfect at the time and she had never had a serious illness in her life (442).

This was based upon Respondent's testimony that:

> "Q. And that continued right along up until the time you left there, didn't it?

"A. Yes.
"Q. Your good health?
"A. Yes" (105).

Respondent's purpose was to lay the ground for a progressive type of injury that grew worse as the breathing of starch dust continued. The learned Circuit Court of Appeals erroneously adopted Respondent's argument (wholly devoid of any proof), and in its opinion said:

> "As she worked increasingly on boys' trousers, which she did up to the time of her discharge, her nose and throat irritation became steadily worse" (442).

There is not one syllable of testimony to support this statement by the Court. Not only this, but it is definitely contrary to the statement of the Respondent herself (105). (Petitioner's Exhibit 3 introduced at (120)).

(37) In discussing *Brooks* v. *Bond* (469), the Circuit Court of Appeals in the case at bar, said:

> "The other doctor called by the plaintiff expressed the opinion that it would be a 'pure guess' to say whether the dust in which plaintiff worked or 'something else' caused his tubercular germs to 'flare up.'
> "Thus, it appears that the testimony of the plaintiff's own medical witnesses did not support his charge that the cement dust breathed by him had caused his tuberculosis" (450-51).

It is difficult to perceive how the learned Court could have concluded that the *Brooks* v. *Bond* doctors were *guessing* and Respondent's were not.

The Tennessee Supreme Court in *Brooks* v. *Bond* (470), said:

> "The difficulty we have with the case, as suggested upon the argument, is that the medical testimony leaves it conjectural whether plaintiff's disability came from the dust inhaled and overwork, or from other causes" (470).

(38) The same difficulty is present in the case at bar just as strongly as it was in *Brooks* v. *Bond*. This record shows, without contradiction, that Respondent's disability could have resulted from a major operation (104) and overexercise, hard work, undernourishment, not taking time to eat enough, overwork, crowded home, pneumonia and influenza (367-68).

(39) The Circuit Court of Appeals said:

> "*National Life and Accident Ins. Co. v. Follett*, 168 Tenn. 647, is not authority for rejecting the opinion testimony of the two doctors introduced by *appellees as valueless*, because qualified by expressions that hypothetical conditions 'might' or 'could' have been the causation of Mrs. Sartin's injury. Adherence to the 'might' or 'could' formula, long followed by the legal profession in Tennessee, in consonance with the *Cumberland Telephone & Telegraph Co. v. Peacher Mill Co.*, 129 Tenn. 374, *Sanders v. Blue Ridge Glass Corporation*, supra, and other Tennessee cases, was deemed unnecessary in the introduction of opinion testimony of expert witnesses. The opinion merely made it clear that attorneys were not to be so restricted" (452-3).

The Learned Court has misconceived our purpose in citing this case. We did not, and do not now, insist that the opinion testimony of the two doctors (although valueless), must be rejected or eliminated from consideration. Whichever rule is applied—"might or could" or "did"—is immaterial. Our position is that the testimony, when given its most favorable construction for Respondents, was not sufficient to take the cases to the jury under the rule announced by the Circuit Court of Appeals in the case at bar:

> "The rights of litigants are not determined by mere conjecture or guess" (451).

When the Tennessee court had under consideration *National Life and Accident Ins. Co.* v. *Follett*, supra, the Court

had previously held in *Cumberland Telephone & Telegraph Co.* v. *Peacher Mill Co.*, 129 Tenn. 374 at 382 that:

> "* * * where the jury must determine which of the causes urged by the respective parties is the right one, an expert's opinion may be admitted to the effect that a certain cause could or might produce the condition; but to permit him to testify as to what in his opinion probably did it would be to supplant the jury by the witness."

In *National Life and Accident Ins. Co.* v. *Follett*, 168 Tenn. 647 at 658, the above holding was overruled, Chief Justice Green saying:

> "The language above quoted from *Cumberland Telephone & Telegraph Co. v. Peacher Mill Co.*, to the effect that an *expert* witness interrogated as to the cause *might be asked* whether 'a certain cause *could or might* produce the condition,' but could not be asked '*what in his opinion probably did*' produce the condition *seems inapt*, if such witness is only asked to draw a *deduction from an undisputed premise*, or from a premise *hypothetically stated*. * * *
>
> "If it is necessary for a jury to have the advice and opinion of an expert witness in order to draw a proper conclusion from certain facts, a definite and positive expression from such a witness would be much more helpful to the jury than a qualified expression * * *" (658).

We only mention this because the above quoted language of the Circuit Court of Appeals' discussion of the two Tennessee cases of *Cumberland Telephone & Telegraph Co.* v. *Peacher Mill Co.*, supra, and *National Life Ins. Co.* v. *Follett*, supra, may be confusing, and it does appear from the Circuit Court of Appeals' above quoted language that the Court has reached the conclusion that, on the authority of the two cases, the testimony of Respondent's two physicians that

"It is *possible* that any foreign substance like that would aggravate and make worse a condition" (155)

"* * * *could or might* have * * * (424) aggravated the condition as to cause it to *develop more rapidly* * * * (423) * * * *might predispose* * * * lower the vitality * * * and make the patient *more prone to* develop the disease" (137).

"* * * *predisposing* cause which would create a *more probable* situation" (422).

constituted sufficient evidence on which the cases at bar could be submitted to the jury, and that the testimony sustains the jury's verdict. These cases in no sense support any such proposition.

(40) Irrespective of what the Supreme Court of Tennessee held in *National Life and Accident Ins. Co.* v. *Follett*, 168 Tenn. 647, that case involved an entirely different state of facts and questions from the case at bar, and the *opinion was rendered* on *March 19, 1935*, while *Brooks* v. *Bond* (469) *opinion was rendered November 7, 1942*, and involved exactly the same Ventilation Statute and the breathing of dust and alleged injury to lungs, and is the present law of the State and the law of this case.

In *Brooks* v. *Bond*, the Court said:

"The difficulty we have with the case, as suggested upon the argument, is that the medical testimony leaves it conjectural whether plaintiff's disability came from the dust inhaled and overwork, or from other causes."

"The doctor did, however, say that working in a room badly ventilated, full of dust, would aggravate conditions if he had a lesion already. He did not, however, say that the dust caused the lesion in plaintiff's lungs. On the contrary, he found nothing in the X-ray to indicate the effects of dust."

"* * * impossible to say whether the dust in which plaintiff worked or something else caused his tubercular germs to flare up. That this would be pure guess."

"He examined the X-ray pictures and saw nothing therein to indicate the effect of dust in the plaintiff's lungs."

"* * * the contention is that the evidence justifies the conclusion that such exposure aggravated plaintiff's condition and occasioned his disability" (471).

"* * * the cause of the development or aggravation was purely conjectural."

"* * * in tort cases of this nature it is true that one of weak physical structure or in ill health is as much entitled to protection as an athlete * * * however, the wrong must be the proximate cause of the physical injury, and under the doctor's testimony here before us, it is *impossible to say that* any failure of the defendant to observe the Factory Inspection Act, rather than other causes, *occasioned or aggravated* the plaintiff's disease * * *."

"* * * where two or more possible causes of injury exist and there is substantial evidence of the existence of one cause and there is no substantial evidence of the existence of any other cause for the injury, a jury's verdict will stand. But all the medical testimony here is that many causes, existing in the life of everyone, make tubercular germs flare up and the disease become active, and there is no substantial evidence before us that the activity of the disease in plaintiff's case was produced by his working conditions. If such a conclusion would be a guess on the part of the doctors, certainly it would be a guess by the jury" (472).

(41) Respondent's Dr. Hodge was asked whether, even though Respondent got the tuberculosis germ from exposure to her tubercular mother or from tubercular Pauline Whittier (101-102-351), the breathing of the dust

> "could or might have aggravated the condition as to cause it to develop more rapidly and cause a greater degree of disability than otherwise" (423),

and he answered:

> "It could or might have done so" (424).

Certainly, this does not change Respondent's position on the record. The element of conjecture or guess is present with equal force with reference to aggravation of an existing condition as it is in the case of the initial cause of the tuberculosis, and the testimony does not meet the rule laid down by the Tennessee Supreme Court in *Brooks* v. *Bond, supra,* and this statement from Respondent's Doctor Hodge falls within the condemnation pronounced against a similar statement in *Brooks* v. *Bond* that:

> "According to Dr. Foust, the cause of the development or aggravation was purely conjectural" (472).

(42) An inference cannot be based upon an inference, but can only be indulged in when the facts are proved by direct evidence. In this case, the jury's verdict necessarily must have been predicated upon three inferences, one on top of the other:

> (1) It must be presumed, first, that the harmless starch dust possibly or might or could have irritated Respondent's lungs;
>
> (2) It must have presumed that breathing the harmless starch dust possibly or might or could have lowered Respondent's vitality; and
>
> (3) That while Respondent was in such state of lowered vitality from breathing harmless starch dust, the tubercular germ took hold.

In *Gulf Refining Co. et al.* v. *Frazier,* 19 Tenn. App. 76 at 103, the Tennessee Court of Appeals said:

> "It is a well established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another, * * * 'Inferences may be drawn from es-

tablished facts, but never from presumptions.' * * * 'Obviously a judgment resting upon inference piled upon inference, may not be sustained.' "

(43) It is definitely apparent, from the opinion of the learned Circuit Court of Appeals, that it has erroneously concluded that all Respondent had to do to sustain a recovery, was to swear that there was dust in the air, that she breathed it, and that it irritated her nose and throat, caused nose bleed, and that the air caused a smothering feeling and headaches, and that proof of these *inconveniences* would involve Petitioner in violation of the statute.

Manifestly, this is not true. The burden was on Respondent to show, not only that there was dust in the air, but that it was of the character and in such quantity as to involve Petitioner in violation of the statute. There is no statutory violation unless the dust is "injurious" or "detrimental" (3-4) to health, and the only requirement is that Petitioner "render dust harmless as far as practicable" (3), and "if there be natural ventilation sufficient to exclude the harmful elements, the statute shall have been complied with" (4). The *inconveniences* complained of cannot be recovered for under the Tennessee Court's holding in *Brooks* v. *Bond* (469).

Even if it could be said that Respondent's mere statement that there was dust in the air and that breathing it caused the inconveniences described made a prima facie case, such statement could do no more than serve to shift the burden of proof, and when Petitioner proved that the dust contained in the air was harmless, and the air Respondent was required to breathe and the temperature met all the requirements of the statute (279-328-252), the burden again shifted to Respondent, Respondent offered no proof to the contrary, and Petitioner was entitled to a directed verdict.

(44) Not only did the Circuit Court of Appeals fail to follow *Brooks* v. *Bond* (469), but the Court also refused to follow *Mayor* v. *Reese,* 138 Tenn. 471, rendered by the Tennessee Supreme Court. The Circuit Court of Appeals held that *Mayor* v. *Reese* is "distinguishable from the case at bar" (451), and, as in the case of *Brooks* v. *Bond,* simply states as a conclusion that the case is distinguishable and refers to the "preceding narrative" (451) in the opinion. The "narrative" neither contains nor refers to any portion of the record where facts appear that are capable of any such distinction, and the record contains no such facts. In *Mayor* v. *Reese,* the deceased sustained an injury to his back, kidneys and bladder from being thrown from a wagon. Afterward, he died from pneumonia, a germ disease. His representative sued, charging that the fall was due to the negligence of the defendant, and that it weakened the deceased's resistance, and he contracted pneumonia, from which he died. Denying recovery, the Court said:

> "Conceding * * * that his condition *became more and more enfeebled,* and that he was thereby rendered an easier victim of the pneumonia germ, we do not see how it can be said that the defendant's wrongful act was the natural and proximate cause of the intestate's death * * * we cannot assent to the proposition that where a person has received an injury * * * and afterwards dies of a germ disease, in no wise connected with such injury, a cause of action arises against the wrongdoer on the theory that by reason of such injuries the victim's constitution became weakened and thereby rendered him an easy prey to such disease" (481).

(45) The case of *May* v. *Bell* (C. C. A. 8, 1932), 61 Fed. (2d) 830, at 841-2, is in full accord with *Brooks* v.

Bond (469) and *Mayor* v. *Reese*, 138 Tenn. 471, and is ample authority for dismissal of the case at bar.

The Circuit Court of Appeals recognized *May* v. *Bell* as sound, but refused to follow the opinion in that case and undertook to distinguish it in the same manner as it did in the Tennessee cases. In *May* v. *Bell*, a boy's foot was injured by a defective escalator in a store, and he later developed tuberculosis.

The Circuit Court of Appeals said:

> "The most that can be said is that the plaintiff's physicians expressed the opinion that the child was more susceptible to tuberculosis after the accident, because of lowered resistance, than he was before the accident, and that it was possible that it was the lowered resistance which caused him to contract the disease."
>
> "The rule as to damages was stated by this court in *Central Coal & Coke Co. et al.* v. *Hartman*, 111 F. 96, 98, as follows: '*Actual damages only* may be secured. Those that are *speculative, remote, uncertain*, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, *not by conjectures* or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The *speculations, guesses, estimates* of witnesses, *form no better basis of recovery than the speculations of the jury themselves. Facts must be proved*, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."
>
> "But a *case* should *never be left to a jury* simply on a question of *probabilities* with a direction to find in accordance with the *greater probability. Probabilities may help out items of evidence from which an*

> *inference can be drawn, but cannot take their place.* To allow a jury to dispose of a case simply upon a weighing of probabilities is to turn them loose into the field of conjecture, and to have the rights of the parties determined by guess."

(46) The Tennessee Statute of Limitations (1932 Code 8595) provides for the bar, within one year, of:

> "Actions for libel, *for injuries to the person*, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise and statutory penalties, within one year after cause of action accrued."

and Petitioner averred in its answer that the cause of action was barred by this statute (37-41) and relied upon the Tennessee Supreme Court case of *Albert* v. *Sherman*, 167 Tenn. 138:

> "* * * the Statute of Limitations begins to run against an action of this kind from the date of the wrongful act rather than the date of the damage caused * * * it is the original injury which is the cause of action, or which gives rise to the cause of action, and that the damage sustained is not the cause of action. The statute begins to run when the cause of action accrues."

And in *City* v. *Gervin*, 169 Tenn. at 542, the Tennessee Court said:

> "In this State, as is now the case generally, the Statutes of Limitations are looked upon by the Courts with favor as statutes of repose."

(47) The learned Circuit Court of Appeals undertook to distinguish *Albert* v. *Sherman*, and excludes the bar of the Statute of Limitations by the statement that Petitioner's alleged negligence involved "continuous tort" (454). The

Court overlooks entirely the undisputed testimony of Respondent's Dr. Abercrombie (384-5) set out in our statement of facts above, that the diseased condition of Respondent's lungs was at its worst on or prior to February 9, 1940 (384-5) one year and six days before these suits were brought on February 15, 1941 (11-12) and even though Petitioner had been guilty of "continuous tort" to and including February 27, 1940 (the date Respondent quit), any tort committed after February 9, 1940, was not actionable, because Respondent's lungs were at their worst on February 9, 1940, one year and six days before the suits were brought, and no breathing of dust thereafter by Respondent could have operated to, or did, change her condition or further injure her lungs.

Specification of Errors.

(48) The District Court erred in overruling Petitioner's motions for directed verdicts (56-57), judgments non obstante veredicto (59-61) and new trials (60-62). There was no evidence entitling Respondents to have the cases submitted to a jury, and upon which the judgments could be sustained.

The Circuit Court of Appeals erred in affirming the judgment of the District Court and in failing and refusing to apply to the facts of the case the applicable local decisions of the Tennessee Supreme Court, being the court of last resort, in the cases of *Brooks* v. *Bond, supra*, and *Mayor* v. *Reese, supra*, and the Circuit Court of Appeals has in the case at bar, rendered a decision in conflict with the decision of the Eighth Circuit Court of Appeals in *May* v. *Bell, supra*.

WHEREFORE, it is respectfully urged that this petition for writ of certiorari be allowed, and that the writ be

granted to review the judgment of the Circuit Court of Appeals for the Sixth Circuit.

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ADDENDA.

Summary of Dust Counts at Plant of The Goodall Company, Knoxville, Tennessee.

(Dust counts in millions of particles per cubic foot.)

Date	Location*	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	Mean	XII
Apr. 1, 1941	3:20– 4:00 P. M.....	2.7	2.4	2.3	1.9	2.1	3.3	1.5	1.6	3.6	2.9	1.6	2.3	3.8
Nov. 28, 1941	11:40–11:55 A. M.....	5.3	2.1	2.6	2.1	5.0	2.0	1.7	2.6	2.9	2.8	3.2	2.9	8.0
Nov. 28, 1941	3:55– 4:15 P. M.....	2.4	2.9	2.2	2.1	2.0	3.1	5.1	1.9	4.0	3.9	8.0	3.4	7.0
Dec. 1, 1941	11:00–11:30 A. M.....	1.6	1.9	4.4	2.9	6.6	2.5	2.3	3.4	2.3	3.2	1.6	3.0	6.0
Dec. 3, 1941	10:20–10:40 A. M.....	1.8	2.7	3.1	2.4	1.9	1.8	1.8	2.5	3.0	2.8	2.8	2.5	1.6
Dec. 19, 1941	3:40– 3:55 P. M.....	4.6	3.2	2.3	2.5	1.9	2.4	2.6	3.7	3.9	5.6	4.8	3.4	2.4
Jan. 23, 1942	11:00–11:15 A. M.....	5.5	4.3	3.3	3.9	4.1	2.2	5.6	5.2	3.6	4.1	4.1	4.2	11.7
	Means.....	3.4	2.8	2.9	2.5	3.4	2.5	2.9	3.0	3.3	3.6	3.7	3.1	5.8

* Location of Counts:

I At machine formerly operated by complainant, 1 ft. from needle, west side
II At machine formerly operated by complainant, 1 ft. from needle, east side
III Center aisle, at end of 4th machine table
IV West aisle, at end of 4th machine table
V West aisle, at end of 5th machine table
VI West aisle, at end of 3rd machine table
VII Center aisle, at end of 3rd machine table
VIII Center aisle, at end of 5th machine table
IX Center aisle, at end of 5th machine table, at floor
X Center aisle, at end of 4th machine table, at floor
XI At Baxter Avenue entrance to plant, inside shop at entrance door
XII At wire fence between Baxter Avenue and plant

Defendant's original Exhibit #22, ordered sent up on appeal in its original form.

(Signed) G. C. Taylor,
Judge.

ADDENDA.

The following is the percentage breakdown of sizing or filler mix:

2.44%	paraffin
.37	stearic acid
.69	soap
38.0	starch
45.6	talc
11.4	sulfate tallow
1.68	castor oil
.005	bluing, 42% of 5000ths of 1% (.00215% free silica)
100.185%	(50% organic; 50% inorganic—approximate)

Defendant's original Exhibit #24 ordered sent up on appeal in its original form.
(Signed) G. C. Taylor,
Judge.

For the sake of argument only, assume that all of the dust in the air came from the filler or sizing and that all of the 45.6% talc is free silica, then add .4% to take care of any free silica contamination in any other ingredients other than talc and make calculations based on 46% of entire sizing or filler mix.

Take Defendant's Exhibit No. 22 and calculate 46% of dust counts at stations I to XI. Also at each station there has been noted the amount of the particles below 10 microns in size:

Station—Locations	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	Mean
Mean Dust Count (Exhibit 22)	3.4	2.8	2.9	2.5	3.4	2.5	2.9	3.0	3.3	3.6	3.7	3.1
Consider all talc (46% of filler) to be free silica	1.6	1.3	1.3	1.2	1.6	1.2	1.3	1.4	1.5	1.7	1.7	1.4
Number particles of talc below 10 microns (95%)	1.5	1.2	1.2	1.1	1.5	1.1	1.2	1.3	1.4	1.6	1.6	1.3

Permissible Standard of Safety for Breathing.

50 Million particles per cubic foot for organic dust particles 10 microns or less in size.
30 Million particles per cubic foot for low silica dust particles 10 microns or less in size.
10 to 20 Million particles per cubic foot for dust with 25 to 35% free silica content 10 microns or less in size.
5 Million particles per cubic foot for free silica dust 10 microns or less in size.